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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 291

UNITED STATES OF AMERICA, APPELLANT

v.

STANDARD OIL COMPANY (INCORPORATED IN KENTUCKY), APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR STANDARD OIL COMPANY

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JURISDICTION

This Court has jurisdiction under 18 U.S.C. 3731. While the filing of notice of appeal by appellant was timely in the District Court, appellant did not serve a notice of appeal upon appellee as required by Rule 10 of the Revised Rules of this Court.

STATUTES INVOLVED

The appellee accepts the appellant's statement of the statutes involved. For convenience, 33 U.S.C. 407 is set forth in the appendix to this brief.

QUESTIONS PRESENTED

1. SHOULD THE APPEAL BE DISMISSED BECAUSE APPELLANT FAILED TO SERVE A NOTICE OF APPEAL UPON APPELLEE, AS REQUIRED BY THE RULES OF THIS COURT?

2. DID APPELLEE'S ACCIDENTAL DISCHARGE OF A SMALL QUANTITY OF VALUABLE GASOLINE INTO NAVIGABLE WATERS CONSTITUTE A CRIMINAL ACT WITHIN THE MEANING OF 33 U.S.C. 407?

STATEMENT

The summary statement, as set forth in appellant's brief, is accurate and acceptable to appellee.

SUMMARY OF ARGUMENT

Appellant admits that it failed to serve upon appellee a notice of appeal as required by Rule 10, nor has appellant filed the required proof of service. Rule 10 makes such failure "sufficient reason for dismissing the appeal." Because criminal statutes are always strictly construed, and because of the non-culpable nature of appellee's unintentional act, the appellee respectfully urges that the Government should be held to the strictest and most exacting compliance with the Rules and that the appeal be dismissed.

The statute which gives rise to the criminal charge against appellee is 33 U.S.C. 407. In summary it prohibits:

1. Discharging "*refuse* matter of any kind," except liquid sewerage, from ship or shore into navigable waters of the United States.

2. Depositing "*material* of any kind" on the bank of any navigable water, where it may be washed into the navigable water and impede or obstruct navigation.

Although "refuse" is a plain and simple word with a commonly accepted meaning, and although it has never been synonymous with "matter of any kind" or "material of any kind," appellant urges upon this Court the proposition that "refuse" is not a limiting, definitive or even a meaningful word and that it should be equated with the broader phrases "material of any kind" or "matter of any kind." Appellant urges the Court, in substance, to delete the word "refuse" from the statute so that the discharge of "any matter of any kind or description" into navigable waters would be prohibited. Appellee will urge, on the other hand, that the word "refuse" should *not* be ignored but should be accorded its normal meaning and definition. Thus, appellee will urge that valuable aviation gasoline, accidentally spilled during a maintenance project, is not refuse matter and that appellee has not violated either the letter or the spirit of the penal statute.

ARGUMENT

1. SHOULD THE APPEAL BE DISMISSED BECAUSE APPELLANT FAILED TO SERVE A NOTICE OF APPEAL UPON APPELLEE, AS REQUIRED BY THE RULES OF THIS COURT?

As pointed out in the summary of appellee's argument, the appellant failed to serve a notice of appeal upon appellee. Appellee brought this to the attention of the Court by filing a motion to dismiss. The Court nevertheless noted probable jurisdiction and placed the case on the summary calendar. Appellee does not intend to abuse the patience of the Court by doing more than calling attention to and reaffirming the arguments in appellee's brief supporting its motion to dismiss.

2. DID APPELLEE'S ACCIDENTAL DISCHARGE OF A SMALL QUANTITY OF VALUABLE GASOLINE INTO NAVIGABLE WATERS CONSTITUTE A CRIMINAL ACT WITHIN THE MEANING OF 33 U. S. C. 407?

The offense prohibited by Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C 407, is discharging "refuse matter" of any kind into navigable waters. The Government urges that "refuse matter" is synonymous with "matter of any kind," and that the crime prohibited is discharging *any* sort of matter into navigable waters. Clearly, if appellant's construction is adopted, the Government will have succeeded in creating a new crime by administrative interpretation. The Government's construction is not tenable for the following reasons:

A. The word "refuse" is not ambiguous and no construction which destroys its meaning is logically defensible.

B. The Government's construction of the word "refuse" obliterates its normal meaning. This could not be anticipated by any reasonable person. The Government's labored construction must fail because:

(i) If adopted, it would deprive the public of fair notice of the scope and extent of the penal statute involved and would make the statute genuinely misleading.

(ii) The Act imposes absolute criminal liability upon an offender, whether or not the act be willful or negligent, and fair notice is even more essential where a statute imposes absolute liability.

C. Even if the Government's construction did not deprive the public of fair notice, the legislative history does not support the construction sought.

D. There is no need for the broad construction sought by the Government.

THE UNAMBIGUOUS STATUTE DEALS ONLY WITH "REFUSE."

Appellee's most obvious answer to the effort by the United States to broaden the meaning and effect of 33 U.S.C. 407 is that the statute simply does not say what the Government wishes. The pertinent part of the statute simply bans the dumping of "refuse matter." It does nothing more.

In the phrase "refuse matter," refuse is an adjective with a specific meaning. Webster's New International Dictionary, 2nd Edition, Unabridged, defines the adjective "refuse" as: "Refused; rejected; thrown aside or left as worthless or of no value; worthless; useless." No other generally known or accepted definition of the word exists.

As there is no ambiguity, there is no justification for any judicial interpretation of the plain and simple word used—"refuse."

THE GOVERNMENT'S CONSTRUCTION WOULD DEPRIVE THE PUBLIC OF FAIR NOTICE.

The language of 33 U.S.C. 407 in prohibiting the discharge of "refuse matter" is plain and not difficult to understand. It defines a specific act which can be avoided without undue difficulty by the average conscientious law-abiding citizen. Compliance with the law simply requires that the persons affected deal carefully with their refuse or waste matter and avoid, on pain of criminal prosecution, using navigable waters for waste disposal. The key to compliance with the law, however, is knowledge by the citizen of the conduct which is prohibited. If that conduct is not plainly defined, fair notice is not given to the public of the activities which

must be avoided. This Court has many times labeled such lack of fair notice as a violation of "the first essential of due process of law."

Insufficient definition of criminal acts could lead to inadvertent crime, an idea abhorrent in our society. To guard against this, it has become axiomatic that a penal statute must be strictly construed. The instant case is a perfect justification for that ancient axiom. Here the Government has attempted to give to a statute a breadth which is completely inconsistent with its plain words. There is no doubt that the Government's construction of the phrase "refuse matter" as synonymous with "any matter" is not the *obvious* meaning of the phrase, nor is it a construction which even the most agile mind could arrive at merely by reading the statute. It is a construction so forced that even the appellant can justify it only by resorting to ancient and ambiguous legislative history. Therefore, it goes without saying that the average citizen could not reasonably suspect that Congress meant "any matter" when it said "any *refuse* matter" instead.

The conviction of this Court that penal statutes must be fairly construed dates back at least as far as the 1899 Act here in question. At that same time, this Court held in *United States v. Harris,* 177 U.S. 305, that a penal statute affecting any railway "company" did not apply to a *receiver* of such a company.

> Upon the whole, the proposition of the government's counsel is that the words "any company . . ." are intended to cover all those who can possibly violate the preceding two sections . . . But we are not now con-

> cerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress . . . to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?
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> * * *
>
> It must be admitted that, in order to hold the receivers, they must be regarded as included in the word "company." Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

The Government's construction would render the statute incongruous, if not unconstitutional, for failure to give fair notice, and would bring it within the class of statutes which have often been struck down by this Court. The point was made succinctly in the recent case of *Cramp v. Board of Public Instruction*, 368 U.S. 278.

> We think this case demonstrably falls within the compass of those decisions of the Court which hold that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." . . . "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." . . . "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

In *Baggett v. Bullitt,* 377 U.S. 360, the Court recently restated the rule:

> The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

In *Champlin Refining Company v. Corporation Commission of the State of Oklahoma,* 286 U.S. 210, this Court was concerned, oddly enough, with the construction of the word "waste" in a statute regulating the oil industry. That statute prohibited "production of crude oil in such manner . . . as to constitute waste." The Court struck down the statute as too vague and wrote:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

While the word "refuse" is not so vague as to be subject to criticism, the artificial construction sought by the Government would, if permitted, make the statute misleading to the public. Thus, the Government's attempted construction of the word, and not the word itself, would cause the statute to run afoul of the principle of the cases just cited.

IT IS ESPECIALLY IMPORTANT THAT A PENAL STATUTE IMPOSING STRICT LIABILITY NOT BE MISLEADING AND THAT IT GIVE FAIR NOTICE TO THE PUBLIC.

The part of 33 U.S.C. 407 dealing with "refuse matter" is a criminal statute imposing absolute liability upon the offender. The offense is not dependent upon the intent of the offender, nor even on his negligence. The offense is committed simply by depositing refuse into navigable waters, however the deposit may have occurred. Because criminal statutes of this type are stringent, even punitive, greater than ordinary care is demanded that they be plainly worded, to avoid any misunderstanding of their scope. Where neither intention nor negligence is a necessary element of a crime, there is greater danger to the public and greater need for plain statutory language, strictly and fairly construed.

In *American Communications Association v. Charles T. Douds,* 339 U.S. 382, this Court held that a challenged statute punishing false statements made "knowingly and willfully" was not fatally vague, because punishment was restricted to willful violators. The Court pointed out:

> There remain two contentions which merit discussion. One is that §9(h) is unconstitutionally vague . . . The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed . . . And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to *acts done with knowledge that they contravene the statute* makes this objection untenable. [Emphasis added.]

Later, in *United States v. National Dairy Products Corporation*, 372 U.S. 29, the Court again sustained a statute as not unduly vague. The Court wrote that the "additional element of predatory intent" provided "further definition of the prohibited conduct." The obvious negative implication is that when intent is not required, and when indeed the crime can be committed without even the negligence of the offender, then it is all the more essential that the statute itself contain the "necessary specificity of warning."

Here the crime can be committed without intent, without malice and even without negligence. All that need occur is that "refuse" be deposited in navigable waters. To give an artificial or unnatural meaning to the key word "refuse" in this statute would completely destroy the requirement of fair notice to the public.

It should be noted that appellant has created the impression throughout its brief that the broad construction of the statute which the Government seeks is necessary to guard against *negligent* dispoiling, and that if its construction is adopted by this Court, the statute would then prohibit will-

ful and *negligent* behavior. For example, at Page 15 of its brief, appellant wrote that "the broad remedial purpose served by the statute is also reflected in Congress' decision to subject to a criminal sanction *negligent* as well as willful acts." Then appellant, by its footnote there, attempted to find evidence of appellee's negligence in the Stipulation of Facts presented to the Court below, whereas the Record plainly shows that no mention of negligence or lack of it was made in the Stipulation or indeed in the Information filed against appellee. Only the word "accidental" was used to describe appellee's behavior.

The Government's persistent effort in this regard is significant for two separate reasons. First, it shows that the Government is unwilling to face up to the full effect of the statutory construction which it seeks. The Government's brief attempts to lessen the obvious consequences of its effort by impiying that the statute would only prohibit willful or negligent acts, rather than impose absolute liability without fault. In fact, neither wrongful intent nor any negligence whatsoever need be alleged or proved by the Government to convict under 33 U.S.C. 407, and, in this very case, neither of those elements was alleged by the Government in its Information against appellee.

Second, the Government's construction of the statute, which would punish willful and negligent acts but not accidents without fault, can be fully appreciated only when it is recalled that the Government attempts to accomplish all this by the interpretation of the single word "refuse." The hopelessness of attempting to create meaningful legislation

by expanding a simple word becomes evident. Thus, the Government's approach would require this Court to hold that "refuse matter" means "any matter of any kind," *except* matter which is neither purposefully nor negligently cast into the water. The Government obviously asks too much.

THE LEGISLATIVE HISTORY DOES NOT SUPPORT THE CONSTRUCTION SOUGHT BY THE GOVERNMENT.

The Government, of course, cannot and does not contend that the statute actually says that spilling "any matter whatsoever" is prohibited, because the words of the statute itself refute any such contention. The prohibited material is "refuse matter of any kind." The Government accurately states that Congress *could* have omitted the word "refuse" and prohibited the dumping of "matter of any kind." But Congress did not do so.

The Government argues that Congress *should* have left out the limiting word "refuse" to help prevent pollution. Here again the answer is that Congress did not do so, and, in any case, the Act specifically exempted sewerage, a much greater source of pollution.

Since "refuse" and "matter of any kind" patently do not mean the same thing, the Government is faced with the burden of producing a satisfactory theory to explain or justify its unusual construction. It bases substantially its entire case on the following historical circumstances: (1) although the major pre-existing Act, the Rivers and Harbors Act of 1890, was almost identical to the 1899 Act here in question (prohibiting the deposit of enumerated kinds of waste and rubbish and concluding with the phrase "ashes,

refuse, or other *waste* of any kind"); (2) a more limited Act also existed, the Rivers and Harbors Act of 1894, which made it unlawful to deposit in certain specified waters only certain enumerated items concluding with the phrase "or any other *matter* of any kind"; and (3) in the very brief Congressional hearings upon the Act of 1899, 33 U.S.C. 407, it was stated that the Act of 1899 was not intended to effect any material change, but was merely to codify the existing laws on the subject, with one or two "slight changes to remove ambiguities" [P. 28 — Appellant's Appendix B]; (4) therefore, Congress must have meant that "waste" or "refuse matter" was to be equated with "any other matter."

But, in truth and in fact, the rationale does not hold true. One of the previous statutes prohibited the dumping of *refuse* and the other, more limited in application, prohibited the dumping of *anything*. It is readily apparent that if a single new act, the Act of 1899, were to replace and supersede both of the previous acts, Congress had to make a choice—either to ban refuse only or to ban everything. If Congress had elected to ban the dumping of "any matter," it could easily have done so. That very possibility was suggested by one of the two prior acts sought to be consolidated. But Congress chose the narrower language and banned the deposit only of "refuse matter."

The Government's logic in now urging that although Congress chose the term "refuse," it meant to use "any matter," completely eludes the appellee. The Government's conclusion would follow from the legislative history if the two terms were synonymous and required no choice. But since one was narrow and restricted and the other was broad

and totally unrestricted, a choice was inevitable, and, having been made, it cannot be disregarded.

The record of the Senate hearings on the 1899 Rivers and Harbors Act throws no light on the previous deliberations of Congress. That record simply reflects that the Senate as a whole gave little attention to the matter and that the subcommittee which codified the pre-existing laws had made only minimal changes "to remove ambiguities." The ambiguity most obvious to appellee is the one just noted involving the choice between prohibiting the deposit of "refuse" or "any matter." There was not a single word in the record about any need or intention to broaden the effect of the general Act of 1890 which prohibited the dumping of waste. Any change intended to ban all matter would have been one of considerable magnitude and it would certainly have invoked some comment.

The Government's brief strives to the limit of credibility for support of its proposition that Congress meant "any matter" when it wrote "any refuse matter." Appellant states that the ban in the New York Harbor Act was broadened in 1888 from "refuse" to "any matter," and indeed it was—but not by implication nor by strained judicial interpretation, but by the simple and obvious method of amending the statute. The 1886 New York Harbor Act prohibited the deposit in that harbor of specified items ending with "other refuse or mill-waste of any kind . . . . " In 1888 the Act was amended and depositing "any other matter of any kind" was prohibited. Instead of supporting the Government's position here that the two terms are synonymous, the history of the New York Harbor Act shows conclusively that Congress was

very much aware of the difference between the two and strongly implies that its choice of the restrictive term "refuse" in the 1899 Act was deliberate.

Finally, an examination of the two sections of the 1899 Act itself should set at rest the charge that Congress did not know the difference between "any refuse matter" and "any material." The first half of Section 13 of that Act bans depositing "refuse" *into* navigable waters. The second half of the same section bans placing "material of any kind" on the bank where it may be washed into the river so as to impede or obstruct navigation. This dichotomy of treatment, by the way, was picked up almost word for word from the original anti-refuse act, the Rivers and Harbors Act of 1890.

The use of a narrow prohibition in one part of a statute and a much broader prohibition in another part of the same act should remove any lingering doubt that there is a difference between the two. The Government admits that the two sections *use* different words, one narrow and the other broad, but it argues that they really mean the same thing because it is not *logical* to give different treatment to those who spill matter into navigable waters and those who pile material along the bank where it may fall into navigable waters. In fact, there are several good and apparent reasons for such different treatment. To successfully prosecute under the latter part of the statute, the Government has the burden of proving that "navigation shall or may be impeded or obstructed." This requirement alone removes from the ambit of this section of the statute a small loss or spill from the bank and permits prosecution only in cases of substantial

magnitude. With this protection, the citizen does not also need the further protection of limiting the *type* of material involved.

There is another reason for treating spillage and stacking differently. While it is unlikely that any significant amount of valuable material which is not refuse will be voluntarily poured *into* a stream, it is likely that valuable, usable goods will be stacked or stored by the river bank. Thus the statute should and does prohibit stacking any matter, refuse or not, by a river in a manner hazardous to navigation. Similar breadth is entirely unnecessary to guard against depositing valuable material *in* the river.

In this area, Congress has evidently concluded that a statute of unlimited breadth is not desirable. Several separate methods of narrowing the scope of the applicable statutes have been used by Congress. Thus in the second part of Section 13 of the 1899 Act (33 U.S.C. 407), the size or volume of the discharge is the critical factor, as Congress has exempted small spills which do not impede navigation. In the Oil Pollution Act of 1924, 33 U.S.C. 431 et seq., Congress has exempted spills which are not willful or negligent, thus avoiding liability without fault. A third course which has been used by Congress is limiting the description of the prohibited material. In the 1890 Act, the 1886 New York Harbor Act and in the first part of Section 13, Congress has limited that description by its use of the phrase "refuse matter." The effect of such choice is to eliminate from the sanctions of the Act the isolated, occasional and accidental spill of valuable, non-refuse matter.

THERE IS NO NEED FOR THE BROAD STATUTORY CONSTRUCTION SOUGHT BY THE GOVERNMENT.

The Government's brief states or implies throughout that unless 33 U.S.C. 407 is held to ban the deposit of *all* matter whatsoever the oil pollution problem will somehow get out of hand. That, of course, is not the case. In the first place, the Oil Pollution Act of 1924 has been passed to deal with oil pollution from ships, far the greatest offenders. In addition, discharging oil which is waste or used oil, sludge and the like, is barred by the present act as effectively as any other "refuse." Refuse is refuse, whether oil or not. There has been absolutely no showing, in the Congressional records or elsewhere, of any need to protect against the occasional spillage and loss of valuable usable oil or gasoline. The Secretary of the Army, in a frank letter to Congress written as recently as 1962, stated that it is "considered desirable specifically to prohibit the dumping of oil *wastes* into all the navigable waters of the United States. . . ." Appellant's brief, P. 14-15 footnote.

The obvious danger at which the statute is aimed is the use of the rivers as depositories of waste and refuse. This problem is brought about almost entirely by willful behavior —by a conscious and repetitious course of conduct rather than by accidental and thus occasional behavior. Such conscious behavior is only likely to occur in the case of refuse matter. Obviously there would be very little purposeful depositing of valuable, non-waste materials into navigable waters. Accidental spills of such valuable material, being occasional, simply are not a source of concern in enforcing the Act.

The Government says the broad construction is necessary to protect navigation. If that were true, Congress could have and doubtless would have prohibited the deposit into navigable water of *any material which impedes navigation*, in which case the definition of the limiting adjective "refuse" would not be before the Court. From appellee's point of view, however, the result would have been the same, because the District Court expressly found that the acts of appellee were "not such as to impede navigation, to damage property or to cause any fire or explosion." Transcript of Record, P. 8-9.

If the need should ever arise, Congress can easily supply the necessary remedial legislation to make unlawful accidental spills of valuable material, but it should have the opportunity to do so purposefully and after due consideration of the specific problem involved, thus affording the public adequate opportunity to be heard.

The Government admits that if its broad interpretation of the statute were adopted it would create a situation where one would be subject to criminal prosecution for the most trivial spillage. But the Government urges that this is not a matter for concern because "the good sense of prosecutors" and the "conscience and circumspection in prosecuting officers" will protect the citizenry. Appellee respectfully disagrees with this theory and as respectfully suggests that its own case is evidence that the "conscience and circumspection" are often absent. The offices of the prosecuting officers and the Corps of Engineers and the Coast Guard are all full of appellee's detailed explanations, apologies and outlines of specific steps already taken to avoid any reoccurrence of its

small, accidental spill, all to no avail. Furthermore, if the Government prosecutors were given the untrammeled power sought here, the average citizen, fearing criminal prosecution, would be very reluctant to report a small accidental spill to the Coast Guard and other appropriate authorities, as the appellee did in the instant case.

Any legislative body debating this issue would doubtlessly deliberate at length as to the necessity of imposing criminal sanctions against every accidental spill of any valuable material. The legislative body would likely insist upon the most persuasive testimony that accidental spills (1) constitute a substantial menace to navigable waters (2) which would be effectively diminished by the imposition of criminal penalties. We submit that neither of these facts has been evidenced and neither of them is true. There is no evidence before the Court that Congress has ever been given the chance even to consider the necessity of making unlawful the accidental spillage of valuable material. Therefore, Congress should not be gratuitously credited with an unsuspecting solution to an unknown problem.

APPELLANT'S CASES

Of the cases cited by appellant, *The Colombo*, 42 F.2d 211 (C.A. 2), dealt with a violation of the New York Harbor Act of 1888, 33 U.S.C 441, which bans the discharge into the harbor of "any other matter of any kind." The Court simply held that oil, even unused oil, was included within the descriptive phrase "matter of any kind" and its discharge was a violation of that broad act.

La Merced, 84 F.2d 444 (C.A. 9), did discuss the applicable act, 33 U.S.C. 407. The Court made certain observations which are in accord with appellee's arguments herein:

> Section 407 as quoted, if read literally, prohibits two acts. The first is the discharge of "any refuse matter of any kind or description whatever * * * into any navigable water of the United States." The other act prohibited is the discharge of "material of any kind in any place on the bank of any navigable water * * * whereby navigation shall or may be impeded or obstructed." The first prohibited act is a discharge of refuse into navigable water. The second is the discharge of "material of any kind" on the bank of navigable water, and the clause makes no distinction concerning the "kind" of material, that is, whether it is refuse matter or not, so long as the material, whatever its character, impedes or obstructs navigation. The first prohibited act is not made dependent on the fact that the refuse matter must impede or obstruct navigation.
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> The sole issue is whether the phrase "any refuse matter of any kind or description whatever" includes "oil" within its meaning.
>
> * * *
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> We see no ambiguity in the statute which prohibits the deposit of "any refuse matter of any kind or description whatever * * * into any navigable water of the United States." It is difficult to see how the statute could be plainer, for the meaning is clear under a literal reading of the statute.
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> * * *
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> Under such literal construction we see no reason for limiting "refuse matter of any kind or description whatever" to such refuse matter only as would impede or obstruct navigation. The plain intention of Congress was to prohibit the discharge into navigable water of any material, *so long as such material was "refuse matter of any kind or description whatever."* If a material

> falls within these words of the statute, the discharge of the same into navigable water is prohibited. *Under particular circumstances,* we see no reason why oil could not be "refuse matter" the same as any other material. [Emphasis added.]

The Court makes it plain that oil *could be* refuse "under certain circumstances," but makes it equally plain that the test is whether or not the oil was in fact *refuse* or *waste* oil.

The final effort of the Government to avoid the limitations of the statute has been to adopt the interpretation of the Second Circuit in *United States v. Ballard Oil Co.*, 195 F.2d 369 (C.A. 2), in which the Court first established that the word "refuse" could not be equated with "matter," but then destroyed the meaning and effect of the word by holding that valuable oil became "refuse" *after* it was spilled. As virtually all matter becomes economically useless after being spilled into a navigable river of the United States, the Second Circuit neatly emasculated the limitations imposed by the statutory word "refuse." If the character of matter after it is deposited into the water is controlling, it was useless of Congress to limit the prohibited material to "refuse." The statutory language plainly describes and defines that which *is deposited* in the river, not what the deposit becomes *after* it is deposited. The Second Circuit simply attempted to reword the statute to prohibit the deposit into navigable waters of "any matter which becomes refuse" when so deposited.

The Government carries this unusual rationale to its extreme by urging that the salvage value of material, after its deposit into the river, is the factor which determines

whether or not the statute was violated when the material was deposited into the river. Having freed itself from the restraint of the ordinary meaning of the word "refuse," the Government cites at page 19 of its brief the case of *United States v. 2,200,000 pounds of Chlorine Cargo*, as a "dramatic demonstration" of a case where low salvage value would establish the matter in question as "refuse." But the Government has left itself on the horns of a dilemma for the unsalvageable item in the *Chlorine* case was a large and useful barge, accidentally sunk in the Mississippi River. Surely no serious contention can be made that a barge, accidentally sunk, can fall within the ban of 33 U.S.C. 407 against "refuse matter . . . thrown, discharged or deposited . . . into any navigable water of the United States." The Government need not distort §407 so, because it can proceed against sunken hulls under other sections of Chapter 33 U.S.C., which is the course actually followed by the Government in the *Chlorine* case, in which no effort was made to prosecute under the refuse section of the statute, §407.

A plain unambiguous statute must be given its plain, unambiguous meaning. To attempt to do otherwise with a criminal statute is overreaching on the part of the enforcement authority. The situation cries out for a strict construction of the applicable criminal statute. Affected citizens should not have their fates and reputations left to the uncontrolled "good conscience" of federal prosecutors. We urge that the Court below was eminently correct in quoting Judge Borah in *United States v. The Delvalle*, 45 F.Supp. 746 (D.C., La., 1942):

The statute in suit is a penal statute and must be strictly construed.

The word "refuse" is used in the statute in its adjective sense. Webster's New International Dictionary . . . defines the adjective, "refuse," as follows: "Refused; rejected; thrown aside or left as worthless or of no value; worthless; useless."

The oil involved in this proceeding was not refused, rejected, or thrown aside or left as worthless or of no value. It was not worthless nor useless. The accidental discharge of valuable, usable oil, under the circumstances set forth, does not constitute a throwing, discharging, or depositing of refuse matter, and is not a violation of the statute. 33 U.S.C.A. §§407, 411 and 412.

CONCLUSION

For the reasons stated, appellee respectfully submits that this appeal should be dismissed or, in the alternative, that the judgment below be affirmed.

Respectfully submitted,

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APPENDIX

33 U.S.C. 407 (Section 13 of the Rivers and Harbors Act of 1899), in pertinent part:

§407.

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: * * *